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**BROOKLYN OFFICE** **MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY**

United States District Court		District: EASTERN DISTRICT OF NEW YORK
Name: <u>BATTISTA GERITANO</u>		Docket or Case No.: <u>CS-17-251</u>
Place of Confinement: <u>N.Y.S. D.O.C.</u>	Prisoner No.: <u>02681-748</u>	
UNITED STATES OF AMERICA		Movant (include name under which convicted)
		v. <u>BATTISTA GERITANO</u>

**RECEIVED**  
FEB 05 2020  
PROSECUTOR'S OFFICE

**MOTION**

(a) Name and location of court that entered the judgment of conviction you are challenging: THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK,

(b) Criminal docket or case number (if you know): CS-17-251

2. (a) Date of the judgment of conviction (if you know): 3/13/19

(b) Date of sentencing: 2/28/19

3. Length of sentence: 78 Months + 3 yrs Supervised Release

4. Nature of crime (all counts): 2 counts - Title 18 U.S.C. § 876(a) Mailing a threatening Communication - that was deposited in the U.S. Mail in The N.Y.S. GREENHAVEN Corr. Facility - Dutchess County NY, which is Part of The Southern District of New York, and not The E.D.N.Y., where Appellant was vindictively, and selectively Prosecuted under Force orders, by use of any and all force.

5. (a) What was your plea? (Check one)

(1) Not guilty ☐

(2) Guilty ☒

(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? Appellant disputed the Court

having Proper and Constitutional Venue, and The fact that The indictment was defective, by not conforming to the Pre-Requisites, or Rule 7(a)(2), however Counsel of record refused to admit motion, or file it until he was relieved by new counsel as a strategic move against Clients wishes - Pled to 1 count § 876 (a) without prejudice

6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☐

Judge only ☐

7. Did you testify at either a pretrial hearing, trial or post-trial hearing?

Yes ☐

No ☐

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

- (a) Name of court: U.S. Court of Appeals for the Second Circuit.  
 (b) Docket or case number (if you know): Court of Appeals Docket # 18-3757  
 (c) Result: Court Denied, However GARZ V. Idatto Contradicts Court's Decision.  
 (d) Date of result (if you know): 12/13/19  
 (e) Citation to the case (if you know): Court Did Not Give Written Decision to Matter.  
 (f) Grounds raised: ① Defective Indictment "Not" conforming to Both U.S. Constitution or (13 Amendments) - as well as not conforming to N.Y. State Constitution, or F.R.C.P. 7(c)(1), 12(b)(7) ② Lack of Proper and Constitutional "Venue" both State/Federal, simply because the offenses were not committed within the E.D.N.Y. ③ AUSA intimidated witness, which breached contract for the Plea agreement.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

- (1) Docket or case number (if you know): \_\_\_\_\_  
 (2) Result: \_\_\_\_\_  
 (3) Date of result (if you know): \_\_\_\_\_  
 (4) Citation to the case (if you know): \_\_\_\_\_  
 (5) Grounds raised: \_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court? Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: U.S. Court of Appeals for the Second Circuit  
 (2) Docket or case number (if you know): 18-1538, 18-1919, 18-3757, 18-804  
 (3) Date of filing (if you know): 12/18/18 Docket # 93  
 (4) Nature of the proceeding: TRIAL COURT Lacks Jurisdiction and Venue

(5) Grounds raised: 3/8/18, Appellant was Produced to Court for a Pro-se Motion that CJA Counsel WAUTHER MACK ESQ refused to adopt, knowing the Court Lacked Jurisdiction, and Venue, Counsel was ineffective, and trial Court refused to accept Motion, as the Court is Biased towards Appellant. The indictment itself is defective, unconstitutional, both state/federally, nor did the offenses take place within The E.D.N.Y., CJA counsel was relieved, and New Counsel JEREMY IANDALO ESQ, took over the case on 6/6/18 on 7/12/18, Counsel of Record instructed Client to accept Plea of Guilt.

(6) Did you receive a hearing where evidence was given on your motion, petition, application?

Yes ☐ No ☒

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction the action taken on your motion, petition, or application?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☒ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: \_\_\_\_\_

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Defective Indictment: Does not conform to the Essential Pre-Requisites, it was not Presented to a Grand Jury having Jurisdiction of the offenses stated therein.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): THE indictment was Presented to the Grand Jury for the E.D.N.Y., as Presented, at the Grand Jury was misled to believe the offenses contained there in the indictment, were committed within the E.D.N.Y., when in fact they were not, because the offenses of Title 18 U.S.C. § 87b(c), Mailing a threatening communication, took place in the Green Haven Corr. Facility, Stormville, NY, Dutchess County, which is a part of the Southern District of New York, and not the E.D.N.Y., More so, The Alleged victim, a lawyer, never sought the help of Law Enforcement, but called in friend/colleague, AUSA, LINDSAY K. GERDES, to Prosecute Appellant in the E.D.N.Y., and to have the Case specifically Assigned to U.S.D.C. Judge STERLING JOHNSON Jr. "Notice" The case was originally assigned to U.S.D.C. Judge MARGO BRODIE, but falsified documents, changed it.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☒ No ☐

(2) If your answer to Question (c)(1) is "Yes," state: Motion to dismiss for Defective Indictment

Type of motion or petition: ~~Appellate~~ ~~to~~ ~~the~~ ~~U.S. Court of Appeals~~ ~~for~~ ~~the~~ ~~Second~~ ~~Circuit~~

Name and location of the court where the motion or petition was filed: U.S. Court of Appeals for the Second Circuit.

Docket or case number (if you know): 18-1538, 18-1919, 18-3757, 18-804

Date of the court's decision: 12/13/19

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☒ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: U.S. Court of Appeals Second Circuit

Docket or case number (if you know): 18-804

Date of the court's decision: 12/13/19

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

GROUND TWO: COURT LACKS Proper and Constitutional Venue, and Jurisdiction.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): THE AUSA LINDSAY K. GERDES ESQ, as favor to alleged victim, who is Attorney, vindictively, and Selectively Prosecuted. Appellant, in wrong district, to conceal fact's that when she was Prosecutor for King's County DA's office - she tried this appellant in State Case, against trial counsel, with whom AUSA GERDES was having a Romantic Affair with trial Counsel's son PATRICK BRACKLEY ESQ, her Name is in fact in the original threatening letter, and these parties concealed it by Protective orders and Selecting the Court to Prosecute the matter in. The offenses, took place in The S.D.N.Y., NOT The E.D.N.Y., or within it.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☒ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: Motion to ~~Dismiss~~ Dismiss for Lack of Venue -

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☒ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: U.S. Court of Appeals for  
The Second Circuit

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: 12/13/19

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

GROUND THREE: ~~ADSDA~~ Request to take Back Plea - because Aust  
breached Contract by tampering with witness for Fetic Hearing -

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): By Counsel  
of record's advice - Jeremy Iardolo Esq instructed client to

accept Plea, simply because he would request Fatico hearing to call witnesses, and alleged victim, however, Counselor Iandolo never requested the Alleged Victim or Victim's, as he or They are Lawyers themselves and never sought the help of Law enforcement. More so, AUSA GERDES, sought to have an upward departure, and a witness Peter J. Bellu, was being called to give testimony to dispute her false allegations, and AUSA GERDES showed up at Peter Bellu's Parole office to instruct him it would be beneficial to him.

## (b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

## (c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☒ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: Motion to take Back Plea.Name and location of the court where the motion or petition was filed: ~~U.S. District Court~~ U.S. COURT OF APPEALS for The Second CircuitDocket or case number (if you know): 18-804Date of the court's decision: 12/13/19

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☒ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: U.S. COURT OF APPEALS for Second Circuit - Re Hearing, En Banc.Docket or case number (if you know): 18-804Date of the court's decision: Not Yet Given.

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

**GROUND FOUR: Ineffective Pre-trial Counsel CJA WALTHER MACK ESQ, and Ineffective Counsel JEREMY IAN DOLO ESQ**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): WALTHER MACK was in conflict with Appellant from Day one - U.S.D.C. Judge STERLING Johnson Jr. Refused to remove Mack as Counsel, as Mack refused to file proper motions requested by client. Upon his being relieved, Months after Appellants filings for dismissal of indictment for lack of venue / jurisdiction, and defective indictment, Mack adopts motion so Johnson could deny them, and New Counsel would not be able to coach motions. Newly retained Counsel instructed client to accept Plea of Guilty because he said the issues were in the appellate court, and the appellate court will reverse, Appellant signed Plea "without Prejudice" to preserve all rights.

**(b) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: Because the filings were recently denied, by appellate court, and Counsel of Record stated that I could not waive rights, if E.D.N.Y. no longer had jurisdiction.

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_



Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☒ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: Because Counsel of Record Jeremy Iandolo, stated to Client

that regardless of Plea - and all contained therein it, The Motion's to  
dismiss it were already filed in The Proper Court - and That The Plea  
is basically Null and Void, especially Since Appellant filed Notice  
of Appeal on U.S.D.C. Judges Denial of Motion's.

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: Ineffective

Counsel for defendant. Simply because Counsel of Record assured  
Appellant that the Plea, and by accepting it, defendant could not  
waive the rights - ~~that~~ - to the issues and matters already filed  
with the higher court. Moreover, counsel of Record instructed client that  
Fatico Hearing would exonerate Appellant, simply because There is no  
victim, no one sought the help of Law Enforcement, the indictment, has no victim.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☒ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. U.S. Court of Appeals for Second Circuit, 18-804, 18-1919, 18-3757,

18-1538, En Banc, Defective indictment, Lack of venue, Prosecutorial misconduct,  
for Tampering with witness, Breaching Contract which is Plea agreement.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

- (a) At preliminary hearing: WALTHER STAUNTAN HACK ESQ, JEREMY IANDOLO ESQ.
- (b) At arraignment and plea: WALTHER STAUNTAN HACK ESQ at arraignment, JEREMY IANDOLO ESQ at plea - 30 days after being retained.
- (c) At trial: \_\_\_\_\_
- (d) At sentencing: JEREMY IANDOLO ESQ
- (e) On appeal: JEREMY IANDOLO ESQ
- (f) In any post-conviction proceeding: JEREMY IANDOLO ESQ.
- (g) On appeal from any ruling against you in a post-conviction proceeding: \_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

\_\_\_\_\_

(b) Give the date the other sentence was imposed: \_\_\_\_\_

(c) Give the length of the other sentence: \_\_\_\_\_

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\*

\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: Because Appellant notified The Court that the indictment was defective, and The Court did not have proper and Constitutional Venue or Jurisdiction, it could have transferred case to Proper court.

or any other relief to which movant may be entitled. Appellant Humbly and respectfully requests This Honorable Court ~~to~~ vacate and dismiss Judgment /and conviction, or to at least re-sentence Appellant in proper category of III in stead of IV because category IV was obtained ~~by~~ unlawfully as conviction is still under appeal /review. presumption of innocence applies as stated in - Nelson v. Colorado - 2017.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on The Day of January 22<sup>nd</sup> 2020 (month, date, year).

Executed (signed) on January 22nd/20 (date).

"without Prejudice"  
Ballester - Gonzalez

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. \_\_\_\_\_